(2)

Supreme Court, U.S.
FILED
OCT 2 1997
CLERK

No. 97-265

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARTIN O. GJERDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether the evidence showed that the federal government was the target of petitioner's fraudulent scheme, such that it was sufficient to sustain petitioner's conviction for conspiring to defraud the United States.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Tanner v. *United States*, 483 U.S. 107 (1987)	5, 6, 7, 8, 10
United States v. *Brown*, 742 F.2d 359 (7th Cir. 1984)	9
United States v. *Hope*, 901 F.2d 1013 (11th Cir. 1990), cert. denied, 498 U.S. 1041 (1991)	9
United States v. *Smith*, 596 F.2d 662 (5th Cir. 1979)	9

Statutes and regulations:

18 U.S.C. 371	2, 5, 6, 7, 8
18 U.S.C. 641	9
42 U.S.C. 5304-5321	5, 9
42 U.S.C. 5306(d)(2)	8
24 C.F.R.:	
Sections 570.420-570.432	5, 9
Section 570.430(a)	8

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-265

MARTIN O. GJERDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 110 F.3d 595.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1997. A petition for rehearing was denied on May 12, 1997. Pet. App. A23. The petition for a writ of certiorari was filed on August 11, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was

convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 33 months' imprisonment, to be followed by two years of supervised release, and was ordered to pay $5,000 in restitution. The court of appeals affirmed. Pet. App. A1-A22.

1. The evidence at trial showed that Congress appropriates money to the Department of Housing and Urban Development (HUD) for the Community Development Block Grant Program, which includes the Small Cities Grant Program. HUD provides the Small Cities Grant Program funds to the States, which in turn make the funds available to communities to foster economic development. The Minnesota Department of Trade and Economic Development (MDTED) is the Minnesota agency in charge of disbursing the HUD funds in accordance with HUD rules and regulations. Pet. App. A3.

Clark and Richard Field controlled Clarkfield Drying, Inc. (CDI), a Minnesota corporation located in Clarkfield, Minnesota. On behalf of CDI, the Fields approached the City of Clarkfield about a $282,000 loan through the Small Cities Grant Program for the purchase of equipment for the operation of a whey drying plant. In their grant application, the Fields stated that they would need an additional $292,000 of private financing to be successful. MDTED informed the City that, before releasing the funds for a loan to CDI, it would need proof through a loan commitment letter that CDI had obtained the private financing. In addition, the funding agreement between CDI and the City of Clarkfield required CDI to prove that the money obtained privately had been spent on CDI

equipment and that the City would be in the first security position with respect to the equipment. Pet. App. A3.

Thereafter, the Fields sought a $292,000 loan from the Bonanza Valley State Bank to provide private financing for CDI. Petitioner, the president of the bank, refused to lend the funds to CDI in part because Clarkfield was outside the bank's service area. The Fields then created a corporation named Minnewaska Capital Investment, Inc. (Minnewaska), a holding and leasing company for CDI located within the bank's service area. They approached petitioner for a $292,000 bank loan to Minnewaska. Petitioner approved the loan without requiring the Fields to submit a loan application or evidence of Minnewaska's financial status. Pet. App. A4.

After the bank issued the loan, Minnewaska immediately transferred the $292,000 to CDI. Within a minute of that transfer, CDI paid $173,000 back to Minnewaska, which then repaid that amount to the bank. The remainder of the loan proceeds was left in CDI's checking account, but petitioner put a hold on the Minnewaska and CDI checking accounts, preventing the Fields from gaining access to the proceeds of the loan. Accordingly, the loan proceeds were never available for use by CDI. Pet. App. A4-A5.

In September 1989, Kevin Stroup, an attorney for the City of Clarkfield, told petitioner that, in order to obtain the HUD funds, the Fields were required to secure $292,000 in private financing and to show that the proceeds of the private financing were used to buy CDI equipment. Petitioner informed Stroup that the bank had lent $292,000 to Minnewaska, he provided records documenting the loan, and he represented that approximately $170,000 of the bank loan had been

spent on equipment for CDI. Petitioner never informed Stroup that $173,000 of the loan proceeds had been repaid to the bank, or that he had placed holds on the CDI and Minnewaska checking accounts to ensure that the remaining proceeds did not leave the bank. Later, petitioner falsely confirmed to Stroup that CDI had spent all of the proceeds of the bank loan on equipment, and that the CDI account had a zero balance. Pet. App. A5-A6.

Based in significant part on petitioner's assurances that the bank loan had been spent on equipment, MDTED authorized the release of funds from the Small Cities Grant Program to the City, which in turn lent $282,000 to CDI. Within three months of the execution of the loan, the Fields repaid the balance of the bank loan. CDI eventually defaulted on the Small Cities Grant Program loan, however. Pet. App. A6. A certified public accountant hired by the City to trace the program funds lent to CDI concluded that the bank loan did not satisfy CDI's obligation to obtain private financing in order to qualify for the HUD funds, and described the loan as "a bogus transaction with no actual capitalization to the corporation." *Id.* at A7.

2. Petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. On appeal, petitioner contended, insofar as pertinent here, that the evidence was insufficient to support his conviction because the conspiracy was not one to defraud the United States or an agency of the United States. Rather, he argued, the City of Clarkfield was the victim of the fraud because the money fraudulently borrowed by the Field brothers belonged to the City. The court of appeals rejected that contention. Pet. App. A11-A13.

The court of appeals observed that, under *Tanner* v. *United States*, 483 U.S. 107, 130 (1987), the government was required to prove that the United States or one of its agencies was the target of the conspiracy. It noted, however, that "[a] conspiracy targeted at the United States or one of its agencies may be achieved by using third parties to effect the conspiracy, because section 371 does not limit the method by which the conspirators may plan to defraud the United States." Pet. App. A12. After reviewing the evidence at trial, the court held that "a reasonable jury could have concluded that the target of the conspiracy was HUD, as represented by MDTED, the state agency that administered the HUD Small City Grant Program funds." *Ibid.* The court explained that, although HUD granted the Small Cities Grant Program funds to the State of Minnesota, that grant was subject to substantial federal regulation. See *ibid.* (citing 42 U.S.C. 5304-5321 and 24 C.F.R. 570.420-570.432)). Based on that extensive federal regulation, the court concluded that MDTED "was acting as an agent of HUD, and any conspiracy to defraud MDTED * * * was in effect a conspiracy against HUD itself." Pet. App. A13. The court added that "[petitioner] and the Fields used the city to perpetrate their fraud against HUD, but this does not alter the conclusion that the object of their conspiracy was to defraud HUD in order to obtain the federal funds." *Ibid.*

The court also rejected petitioner's claim that there was no violation of Section 371 because the State rather than the federal government imposed the "matching-funds" requirement. Noting that Section 371 prohibits both conspiracy to commit offenses against the United States and conspiracy to defraud

the United States, the court held that, "[w]hile allegations of a conspiracy to commit an offense against the United States would require proof of an agreement to violate a federal statute or regulation, allegations under the other conspiracy clause, that is, a conspiracy to defraud the United States, do not engender the same requirement." Pet. App. A13.

ARGUMENT

Petitioner contends that the evidence was insufficient to support his conviction for conspiracy to defraud the United States because the City of Clarkfield, not the United States, was the target of the fraudulent scheme. Relying exclusively on *Tanner* v. *United States*, 483 U.S. 107 (1987), petitioner argues that a city receiving federal financial assistance through a state agency is not an agent of the United States for purposes of Section 371. That contention provides no basis for a challenge to the validity of petitioner's conviction, which is fully consistent with *Tanner*.

Tanner involved loans guaranteed by the Rural Electrification Administration (REA) for the construction of a power plant for Seminole Electric Cooperative, Inc. (Seminole). Seminole's procurement manager conspired with a friend to steer contracts to the friend's construction company in return for kickbacks. The procurement manager and the owner of the construction company were charged with conspiring to defraud the United States in violation of Section 371. The government's theory was that, because Seminole's construction project received federal financial assistance and because the REA supervised some of the construction, a conspiracy to defraud Seminole was equivalent to a conspiracy to

defraud the United States. See 483 U.S. at 130 ("The Government argues that, because Seminole received financial assistance and some supervision from the United States, a conspiracy to defraud *Seminole* is *itself* a conspiracy 'to defraud the United States.'"). The Court rejected that argument, and held that a conspiracy to defraud a private corporation receiving financial assistance from the federal government does not constitute a conspiracy to defraud the United States. *Id.* at 129-132. The Court added, however, that conspiracies to defraud the federal government may be accomplished through innocent intermediaries, *id.* at 129, and the Court remanded the case to determine whether the defendants conspired to cause Seminole to make misrepresentations to the REA, *id.* at 132.

This case is markedly different from *Tanner*. In *Tanner*, the target of the defendants' fraudulent kickback scheme was Seminole. The federal government had only an incidental role in the power plant project as guarantor of the construction loans. That role, the Court concluded, could not transform the scheme into a fraud against the United States, for otherwise any conspiracy to defraud an entity or person receiving federal assistance would fall within Section 371. See 483 U.S. at 132.

In this case, by contrast, HUD was the primary target of petitioner's scheme, the object of which was to obtain federal Small City Grant Program funds fraudulently. It is of no consequence that the HUD Small City Grant Program was administered by MDTED, a state agency. Under the statute governing the program, a State may elect to distribute the HUD funds, as Minnesota has done, but in the absence of such an election by a State, HUD distributes

the program funds itself. See 42 U.S.C. 5306(d)(2); 24 C.F.R. 570.420(a). Accordingly, a state agency such as MDTED, charged with distributing HUD funds under the Small City Grant Program in an electing State, performs the same role that HUD performs directly in non-electing States. A scheme to obtain HUD funds fraudulently through MDTED in Minnesota is no less a fraud against HUD than is a scheme to obtain federal funds directly from HUD in a non-electing State.

Nor is it dispositive that petitioner made his misrepresentations to the City of Clarkfield, rather than MDTED directly. The City conveyed and was expected to convey those misrepresentations to MDTED, which, in reliance on the misrepresentations, authorized release of funds from the Small City Grant Program to the City for payment to CDI. Pet. App. A6. Although the misrepresentations were made directly to the City, the purpose and the effect of the misrepresentations were to induce fraudulently the release of federal funds from MDTED. Such fraudulent actions fall well within the scope of Section 371; in *Tanner*, the Court made clear that conspiracies to defraud the federal government may be punished under Section 371 even when they are accomplished through innocent intermediaries. 483 U.S. at 129.

Petitioner emphasizes (Pet. 10-11) that HUD's disbursement of funds to MDTED through the Small City Grant Program took the form of a grant rather than a loan, and argues that HUD no longer had any stake in the funds after they were granted to MDTED. The fact that the federal payment initially had the form of a grant disbursed to MDTED did not deprive the funds of their federal character for purposes of Section 371. In cases construing the statute

prohibiting the theft of any "money[] or thing of value of the United States," 18 U.S.C. 641, courts have suggested that, when an "outright grant is paid over to the end recipient, utilized, commingled or otherwise loses its identity, the money in the grant ceases to be federal." *United States* v. *Hope*, 901 F.2d 1013, 1019 (11th Cir. 1990), cert. denied, 498 U.S. 1041 (1991). But courts have also held that "while identifiable funds appropriated for use in a federal program are in transit between their federal source and their intended recipient and are still subject to substantial federal controls, they remain federal funds." *Hope*, 901 F.2d at 1019; see also *United States* v. *Smith*, 596 F.2d 662, 664 (5th Cir. 1979).

The court of appeals therefore correctly concluded that the Small City Grant Program funds obtained fraudulently by petitioner retained their federal character. At the time of the fraud, the HUD funds were still in the possession of MDTED, a state agency charged with distributing them to their end recipients pursuant to a federal objective, and that federal grant was still subject to substantial federal regulation under 42 U.S.C. 5304-5321 and 24 C.F.R. 570.420-570.432. Cf. *Hope*, 901 F.2d at 1016, 1019 (funds advanced by county, as grantee of HUD, to nonprofit organization formed to administer economic development program, in anticipation of immediate federal reimbursement and for purposes governed by federal statutes and regulations, were federal funds); *United States* v. *Brown*, 742 F.2d 359 (7th Cir. 1984) (funds disbursed by county as grantee of HUD to an operator of programs for the disadvantaged were federal funds within reach of 18 U.S.C. 641, because of the accountability both of the subgrantee to the grantee and of the grantee to HUD for the proper

disbursement of block grant funds intended for federally sanctioned purposes).

Contrary to petitioner's contention (Pet. 12), neither the fact that he was ordered by the district court to pay restitution to Minnesota rather than to HUD, nor the fact that only the City of Clarkfield and not the United States filed a claim in connection with CDI's bankruptcy proceeding, proves that HUD no longer had a stake in the Small City Grant Program funds once they passed to the State. The federal government's interest in recovery of the fraudulently obtained funds is fully served by restoration of the funds to the State for further distribution in accordance with the requirements of the federal program.

In any event, the government need not show that HUD incurred a direct financial loss as a result of the conspiracy in order to establish that it was a target of the fraud. As the Court stated in *Tanner*, if a defendant's "actions constituted a conspiracy to impair the functioning of [a federal agency], no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371." 483 U.S. at 128. When federal grant program funds are, as a result of a conspiracy to defraud, disbursed by a state agency charged with administering the program to a party not entitled to receive them, the function of the program is necessarily impeded and the federal government is properly regarded as a target of the fraud.*

---

* The indictment alleged that petitioner conspired with the Fields to "defraud the United States * * * of funds belonging to [HUD]." Pet. App. A42. In finding that petitioner engaged in a conspiracy fraudulently to obtain HUD funds, the jury necessarily concluded that he conspired to impair the lawful

Finally, it is not significant that MDTED rather than HUD imposed the "matching-funds" requirement. MDTED imposed the requirement to ensure that any disbursement to CDI of HUD funds would achieve the objective of the Small City Grant Program of facilitating community development in small cities. Petitioner's fraudulent scheme to evade MDTED's "matching funds" requirement targeted HUD funds and sought to impede the Small City Grant Program no less than if the requirement had been imposed by HUD itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

OCTOBER 1997

---

functioning of HUD. The indictment was not required to make that objective explicit.